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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-479.

KATHLENE C. MARENO and ANTONIO MARENO,
Petitioners,

vs.

WESTCHESTER ROCKLAND NEWSPAPERS, INC., and RAYMOND MARGLES,
Respondents.

Brief of Respondent, Westchester Rockland Newspapers, Inc., in Opposition to Petition for Certiorari.

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In the

Supreme Court of the United States

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No. 71-479.

Kathlene C. Mareno and Antonio Mareno,

Petitioners,

vs.

Westchester Rockland Newspapers, Inc., and Raymond Margles.

Respondents.

Brief of Respondent Westchester Rockland Newspapers, Inc., in Opposition to Petition for Certiorari.

Petitioners seek certiorari to the Appellate Division of the Supreme Court of New York, although New York's highest court, the Court of Appeals, dismissed petitioners' motion for leave to appeal to that court because the motion "was not timely made" (Court of Appeals July 7, 1971, Order, p. 32, Petitioners' Brief).

It follows that the decision petitioners ask this court to review was not a decision "rendered by the highest court of a state in which a decision could be had, • • •" (Title 28, §1257 U. S. C.) and, therefore, the petition has no jurisdictional foundation.

The Facts.

Petitioners were plaintiffs in New York Supreme Court libel actions against respondent Westchester Rock-

land Newspapers, Inc., a newspaper publisher, and respondent Margles.

After completion of discovery, defendant Westchester Rockland Newspapers, Inc., was granted summary judgment against petitioners under the New York State Civil Practice Law and Rules by decision dated June 11, 1969, at Special Term of the Supreme Court, and judgment was entered in favor of Westchester Rockland Newspapers, Inc., against plaintiffs (petitioners here) on June 30, 1969.

Petitioners appealed to the Appellate Division of the Supreme Court, which, by order of October 5, 1970, unanimously affirmed the summary judgment. Petitioners then moved in the Appellate Division for reargument, which it denied by order of December 1, 1970 (pp. 30-31, Petitioners' Brief).

Finally, petitioners moved in the New York Court of Appeals for permission to appeal, since under New York practice, the unanimous affirmance by the Appellate Division prevented petitioners from appealing to the Court of Appeals as of right, and required them to move for leave to appeal.

By order of July 7, 1971, the Court of Appeals dismissed the petitioners' motion for leave to appeal "upon the ground it was not timely made" (Appendix D to Petitioners' Brief, pp. 31-32).

Thus, six justices of the New York Supreme Court (one at Special Term and five in the Appellate Division) have found petitioners' libel actions meritless.

There is no Constitutional or Federal Question Presented by Petitioners.

When petitioners moved for leave to appeal to the New York Court of Appeals in June, 1971, that

court determined that petitioners' motion came too late under CPLR 5513 (c), which fixed the time within which such motion could be made, and the court dismissed petitioners' motion for petitioners' failure to move within 30 days after "service upon the parties seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, * * *" (CPLR 5513 [c]).

It is not disputed that a copy of the October 5, 1970, unanimous Appellate Division affirmance of summary judgment against petitioners, with written notice of entry, was served by mail upon petitioners' attorneys on January 13, 1971. Thus, the time within which petitioners could move for leave to appeal expired 33 days thereafter, i. e., on February 15, 1971 (CPLR 5513 [c]).

When petitioners moved for leave to appeal to the New York Court of Appeals in June, 1971, that court determined that petitioners' motion came too late under CPLR 5513 (c), which fixed the time within which such motion could be made, and the court dismissed petitioners' motion as "untimely," i. e., failure to move within 30 days after "service upon the parties seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, * * *" (CPLR 5513 [c]).

Petitioners recognize their four-month delay in moving for leave to appeal to the Court of Appeals in their first "Question Presented" at page 2 of their brief which reads:

> "No. 1. Was the dismissal of petitioners' motion for leave to appeal to the Court of Appeals made upon an adequate state ground which precludes review of the Appellate Division's determination of the underlying Federal questions by a writ of certiorari?"

Mere examination of the uncontested facts compels an affirmative answer to this question of "an adequate state ground" and the clear existence of this adequate ground makes moot petitioners' second and third questions.

Petitioners do not even reach discussion of this essential first question in their petition until at and after page 11, under the heading, "The Motion in the Court of Appeals."

Petitioners' first sentence under that heading reads as follows:

> "Since the disposition of the federal questions at Special Term *turned on subsidiary state questions of a non-constitutional nature,* i. e., evidentiary and procedural, petitioners sought leave to appeal to the Court of Appeals from the order of affirmance entered by the Appellate Division under the statute governing permissive appeals." (Italics supplied.)

This sentence is an admission by petitioners that they have no direct right of appeal to the New York Court of Appeals on the constitutional grounds provided by 5601 CPLR, which reads:

> "(b). Constitutional grounds. An appeal may be taken to the Court of Appeals as of right:
>
> "1. From an order of the Appellate Division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States;"

Petitioners were thus required to move for permission to appeal under 5602 (a) 1 (i) CPLR, entitled, "Appeals to the Court of Appeals by Permission," which reads:

> "5602 (a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate

division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

"1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

"(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, * * *."

We pass again to CPLR 5513 (c), the applicable portion of which reads:

"The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry * * *."

Petitioners do not deny that the order of affirmance by the Appellate Division with notice of entry was served on their attorney (who subsequently made the late motion for leave to appeal) by mail, on January 13, 1971. Attempting to avoid the effect of this service as limiting their time to move in the Court of Appeals, they argue under CPLR 5513 above quoted, that the order and notice of entry was required to be served upon petitioners personally, and service on their attorney was insufficient.

Petitions completely disregard R. 2103 (b) of CPLR which reads:

"Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon his attorney."

There is no Jurisdiction Here Under §1257 of Title 28.

As petitioners admit at page 1 of their petition, their application is based upon 28 U. S. C. 1257, the applicable portion of which reads:

> "§1257. State courts; appeal; certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 24, 1948, c. 646, 62 Stat. 929."

This statute is jurisdictional and places upon petitioners the burden of showing that they seek to review a final judgment "by the highest court of a State in which a decision could be had, • • •."

By the facts here, petitioners show that they did not obtain a final judgment of the highest court of New York, i. e., the Court of Appeals, by making a timely motion in that court for leave to appeal, within 30 days after service upon their attorney of Appellate Division's unanimous affirmance of summary judgment against them.

They failed to do this. They delayed for some 90 days after the service on their attorney of the Appellate Division's order of affirmance and notice of entry.

before moving the Court of Appeals for leave to appeal, and that court very properly determined that petitioners' motion "was not timely made."

There can be no dispute that the merits of the Special Term order or the Appellate Division's affirmance of summary judgment were never determined by the New York Court of Appeals, because petitioners made no timely application to that court to review it.

It is this which compels petitioners to raise their first "Question Presented" (p. 2 of Petitioners' Brief) in the form that we quoted, *supra*, at page 3, which presents only a pure question of state procedural law, i. e., will service on a party's attorney under §5513 (c) CPLR limit the time within which to move for permission to appeal.

We must note here that it was petitioners' attorney who was served with the Appellate Division's affirmance and notice of entry, who subsequently made the untimely motion in the Court of Appeals for permission to appeal.

There is nothing remotely resembling a federal question in petitioners' contention that service of an order to be appealed from should have been on them personally and not on their attorney. This is a pure New York question of construction of a New York procedural statute.

Petitioners make no claim of lack of due process or lack of equal protection of the laws, and none could be made arising out of this question of procedural construction.

Petitioners admit on their application for certiorari that this state procedural question is the first, the primary question for decision. We agree with this, and

point out that this is not a federal question: it has no bearing upon or even faint flavor of any federal question but is simply and clearly a construction by the highest court of the State of New York of a New York procedural statute regulating the persons to be served with copies of appealable papers and notice of entry, to limit the time for appeal and motions for permission to appeal.

In *McMaster v. Gould*, 276 U. S. 286, 72 L. ed. 574 (1928), the court dismissed a petition for certiorari to review a judgment of the New York Appellate Division under facts substantially identical to those presented by petitioners here.

In *McMaster*, petitioners had sought leave to appeal from a unanimous Appellate Division affirmance, to the Court of Appeals, by motion in the Appellate Division, which it denied. Then petitioners, without making a motion in the Court of Appeals for leave to appeal, took a direct appeal to that court. The Court of Appeals dismissed the appeal taken without permission (242 N. Y. 604, 152 N. E. 446), as in our case, it dismissed petitioners' untimely motion for leave to appeal.

Dismissing the petition for certiorari for lack of jurisdiction, the Supreme Court wrote (276 U. S. 286):

> "And since the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the court of appeals for such leave, the judgment is not that of the highest court of the state in which a decision could be had. See *Newman v. Gates*, 204 U. S. 89, 95, 51 L. Ed. 385, 389, 27 Sup. Ct. Rep. 220. In any respect, we are without authority to review the judgment; and the writ is dismissed for want of jurisdiction."

Applying this holding to our case, we state that, since petitioners here did not make a timely motion in the

Court of Appeals for such leave, "the judgment is not that of the highest court of the state in which a decision could be had" (*supra*).

Petitioners Mareno are in an identical situation with petitioners in *McMaster,* whose petition for certiorari was dismissed for failure to move the New York Court of Appeals for leave to appeal. Petitioners here did not make a timely motion in the Court of Appeals for leave to appeal, and their failure to make a motion within the jurisdictional period is the same as the failure of petitioners in *McMaster* to make any motion. An untimely motion, where time is jurisdictional, is the same as failure to move. Petitioners waived their right to seek review by the New York's highest court by delaying their motion for more than 30 days after their attorney had been served with the order below and notice of entry. Their waiver and inaction permitted expiration of jurisdiction to review by the Court of Appeals.

In *McMaster,* the court held that petitioner had affirmatively disclosed lack of jurisdiction under Judicial Code §237 (b) (the predecessor of Title 28, §1257) because *McMaster* had failed to show that New York's highest court, its Court of Appeals, had taken any action with respect to the merits of their claim, but had merely dismissed an improperly taken appeal, as that same court, in our case, dismissed an untimely motion for leave to appeal.

Petitioners endeavor to argue here that their motion for leave to appeal was timely, but this is not a federal question, nor does it arise under §1257 (3) U. S. C.

Petitioners' argument that their motion was timely, to succeed, must overcome the incredible burden of showing that, while a radical change of appellate jurisdictional practice (i. e., the change of requiring service of appealable papers on parties rather than their attorneys)

was effected in 1963 by CPLR 5513, petitioner Mareno is the first lawyer or judge to discover that radical change first disclosed eight years ago.

Petitioners concede that in New York, at all times before the 1963 adoption of CPLR, service of an order or judgment with notice of entry upon the attorney for a party was sufficient to limit time to appeal.

Were petitioners' argument for a radical change in 1963 correct, they would have to show that, with the adoption of CPLR in 1963, a radical change was made not only in motions for leave to appeal to the Court of Appeals: they would also have to show that this change affected all appeals, for 5513 CPLR governs not only motions for leave to appeal, but also "Time to appeal, cross appeal or move for permission to appeal" (section heading) in general. It governs all appeals from all courts to all other courts to which CPLR applies, and any radical change would have affected all these appeals.

It would follow then that, were petitioners correct, the time within which all New York appeals should have been taken, since the adoption of 1963 CPLR, should have been determined by service of the paper appealed from upon the party personally, not upon his attorney, for subdivision (a) of 5513 refers to "service upon the appellant of a copy of the judgment, or order appealed from and written notice of this entry," and subdivision (b), relating to "time to take cross-appeals," reads that "a party upon whom a notice of appeal is served must take an appeal within ten days after such service, * * *."

Thus, petitioners would construe subdivision (b) of 5513 CPLR to mean that not only appealable papers with notice of entry must be served upon parties personally, but also all notices of appeal must be served upon parties and not their attorneys.

This court can judicially notice the fact that the holding of the Court of Appeals here, dismissing petitioners' motion for leave to appeal because it was "untimely," i. e., made some 90 days after service of the order appealed from upon the attorneys for the appellant, is supported by the fact that no New York court has held that there has been any such radical general change of all appellate procedure in New York. After eight years under CPLR, there is not a single case to support this baseless argument of petitioners that appealable papers must be served upon a party rather than his attorney.

It would be strange indeed if, after eight years of New York State appellate practice under CPLR, petitioner Mareno were the first attorney to discover that such a radical change in appellate practice was intended, a change which would end generations of settled procedure by which service was made on attorneys, not their clients.

The form and substance of petitioners' first "Question Presented":

> "No. 1. Was the dismissal of petitioners' motion for leave to appeal to the Court of Appeals made upon an adequate state ground which precludes review of the Appellate Division's determination of the underlying Federal questions by a writ of certiorari?"

compels the answer "Yes," and the petition should be dismissed for lack of jurisdiction.

Petitioners' second "Question Presented" reads:

> "2. Was the principle of the *New York Times* case properly applied to the evidence adduced on respondent publishers' pre-trial motion for summary judgment under the causes of action in libel?"

Judge McCullough's opinion at Special Term (Petitioners' Appendex A, pp. 25-28) shows that this question

must be answered "Yes," because of Judge McCullough's careful and informed application of the law of *New York Times* to the undisputed facts in this case.

Judge McCullough wrote at page 26 of the appendix:

> "It is the contention of the defendant newspaper that at the time the article was published no one connected therewith had any knowledge that there was anything false in the publication and did not publish with reckless disregard of truth or falsity, or in extreme departure of responsible publishing procedures. This court agrees with the contention of the defendant newspaper that, by the standards set forth in the *New York Times v. Sullivan* (376 U. S. 254, 11 L. Ed. 2d 686), and the companion cases of *Curtis Publishing Co. v. Butts*, and *Associated Press v. Walker* (388 U. S. 130, 18 L. Ed. 2d 1094), the statements contained in the article are not actionable as against the defendant newspaper."

The court closed its opinion (p. 28, Petitioners' Appendix) by quoting from *New York Times v. Sullivan* (376 U. S. 254, 270), the excerpt which the court in that case took from Mr. Justice Brandeis:

> "Those who won our independence believed • • • that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the

> argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

Judge McCullough's holding is a clear decision, after consideration of all of the materials advanced by both parties, pleadings, affidavits and discovery material, that plaintiffs (petitioners) had utterly failed to show that, at the time of the publication, respondent publisher had any knowledge of falsity in the publication, and that the publication was not made with any reckless disregard of truth or falsity.

Petitioners do not even discuss the Special Term holding in this respect. Instead, they try to erect a sham argument upon alleged inconsistencies between the discovery and affidavit statements of respondent Margles and the matter published (Petitioners' Brief, pp. 6-8). There is no reality to these claimed inconsistencies.

However, even accepting this baseless hypothesis of inconsistencies between what respondent Margles said and what was published, the answer is that the court found it to be the fact that, at the time of the publication, the respondent publisher had no knowledge of falsity in the publication, and there was no reckless disregard of truth or falsity. This was the heart of this case below, and nowhere in their petition do petitioners address themselves to this essential issue.

A mere reading of the claimed libelous publication (pp. 4 and 5 of petition) discloses that there is no charge of crime, no charge of any disgraceful act or any act which would bring petitioners into public disgrace, but merely statements that petitioners' litigation was "legal harassment of the worse kind" and "motivated by the basest political motivation and is merely an attempt to embarrass Mr. Kibbe and the Town Board" and the ex-

pression of the town attorney's opinion that the action was a "contemptible action" which would "cause the Town to turn on them with revulsion."

How could one prove the objective meaning or the truth or falsity of "legal harassment of the worse kind," or of "basest political motivation," or of the completely subjective statement, "I feel that this case will cause the Town to turn on them with revulsion"?

These are not objective charges of wrongdoing; they are merely emotional expressions of purely subjective opinion.

When Special Term granted summary judgment against petitioners, it was well justified in writing of petitioners' taxpayers' action, "Once the plaintiffs had undertaken to put themselves in this position, it follows logically that they should have expected criticism from those persons who did not agree with their position" (p. 27, appendix to Petitioners' Brief).

At page 13 of petitioners' brief, we find:

> "The pre-trial dismissal of the instant action at Special Term resulted in the total denial to Petitioners of their day in court devoid of any meaningful application of the constitutional malice test enunciated by this court in *New York Times v. Sullivan*, 376 U. S. 254. In the case of the libel causes of action, the malice test was plainly misapplied."

After making this statement, petitioners never even state the *New York Times* malice test, *i. e.*, actual knowledge of falsity or reckless disregard of truth or falsity; never point out the fact that Special Term cited that case, quoted from it, and found that plaintiffs had failed to meet the burden of the *Times* test.

At page 2, petitioners state:

> "Question 2. involves the first amendment freedom of the press guarantee in the Constitution of the United States as applied to the states through the fourteenth amendment to the same constitution."

Here, they refer to their suppressed argument, never made completely explicit, that respondent Westchester Rockland Newspapers, Inc., after publishing the greater part of petitioners' first letter, dated June 24, 1965, did not publish petitioner Mareno's second letter to it.

We must note here that this letter of July 27, 1965, which petitioner Antonio Mareno sent respondent publisher but which was not published, says at the beginning of its second paragraph:

> "But I will not lend dignity to the offensive statements by repeating them or replying to them. Neither will I discuss the merits of the lawsuit."

It is difficult indeed to understand how petitioner Mareno can insist that respondent was under the duty of publishing his letter in which he stated that it was not a reply to alleged "offensive statements."

How can a duty to publish a non-reply arise?

It is clear, of course, that the duty of a publisher (if any) to publish a controversial letter of a reader was no part of the problem discussed in *New York Times v. Sullivan*. *New York Times v. Sullivan* discussed no such legal duty.

Again at page 11, petitioners write:

> "Further, when Respondent publisher undertook for the first time on appeal to impugn my argument, the evidence at Special Term on the subject of the gagging of Petitioners. Petitioners endeavored in their motion for reargument of the

> appeal to place before the Appellate Division the documentation (App. E) underlying this evidence, pursuant to the court's power to make new findings of fact under CPLR 5501 (C)."

Petitioners have utterly failed to show how an alleged failure by a publisher, charged with a libel, to publish a letter in which petitioner Mareno writes that it is not a reply to the libel, can have any relevance under petitioners' second question, which relates solely to the principles of law laid down in *New York Times v. Sullivan*.

Conclusion.

The petition for certiorari should be denied for lack of jurisdiction because:

a. It does not seek review of any

> "final judgments or decrees rendered by the highest court of a state in which a decision could be had, * * *."
>
> (Title 28, Section 1257 U. S. C.)

b. Here, petitioners have shown no "title, right, privilege or immunity" which "is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States" (Title 28, Section 1257, subdivision 3, U. S. C.).

c. Summary judgment in the libel action in favor of respondent Westchester Rockland Newspapers, Inc., was properly granted at Special Term and unanimously affirmed by the Appellate Division of New York State Supreme Court under *New York Times v. Sullivan*, 376 U. S. 254, because of petitioners' failure to make any showing that the publication

was made with actual notice of falsity or in reckless disregard of truth or falsity.

November , 1971.

Respectfully submitted,

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